No. 80-18

In The

Supreme Court of the Unitd States

October Term, 1980

UNIVERSAL WASTE CONTROL and
WASTE MANAGEMENT, INC.,
Petitioners,

v.

WESTERN WASTE SERVICE SYSTEMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Paul G. Ulrich
LEWIS AND ROCA
100 West Washington Street
Phoenix, Arizona 85003
602/262-5311

Joseph V. Giffin
CHADWELL, KAYSER, RUGGLES, MCGEE & HASTINGS, LTD.
8500 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
312/876-2100

Counsel of Record for Petitioners

Additional Counsel:
Andrew S. Gordon
Foster Robberson
LEWIS AND ROCA
100 West Washington Street
Phoenix, Arizona 85003
602/262-5311

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Universal Waste Control and Waste Management, Inc., petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on March 4, 1980.

QUESTIONS PRESENTED FOR REVIEW

1. When considering a motion to dismiss an action under the Sherman Act for lack of subject matter jurisdiction, does the district court have the authority to consider evidence offered by the parties and resolve factual disputes relating to the court's jurisdiction or, as held by the Ninth Circuit, must it permit the plaintiff to go to trial on the merits if the plaintiff presents any evidence, no matter how meager, supporting the jurisdictional allegations? There is substantial conflict among the circuits on this issue.

2. Did *McLain v. Real Estate Board of New Orleans, Inc.*, 100 S. Ct. 502 (1980), change the well-settled rule that Sherman Act jurisdiction exists only if the matters complained of occurred in or substantially affect interstate commerce?

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OPINIONS BELOW

There is no reported or unreported opinion of the district court. The district court's judgment dismissing the case is attached hereto as Appendix A. The Ninth Circuit's opinion is reported at 616 F.2d 1094 (9th Cir. 1980) and is attached as Appendix B.

JURISDICTION

Plaintiff filed its initial complaint on March 4, 1977, alleging that defendants had violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 in connection with providing waste disposal services in the Phoenix, Arizona metropolitan area. Plaintiff claimed the district court had jurisdiction pursuant to 15 U.S.C. §§ 1, 2 and 15 and the doctrine of pendent jurisdiction. After permitting full discovery on the jurisdictional issue, the district court granted defendants' motion to dismiss for lack of jurisdiction over the subject matter and entered a judgment of dismissal on August 30, 1977. See Appendix A.

The Ninth Circuit reversed on March 4, 1980, with one judge dissenting. See Appendix B. A timely petition for rehearing and suggestion of appropriateness of a hearing by the court in banc was filed on March 17, 1980. The petition for rehearing was denied and the suggestion for a rehearing in banc was rejected on April 28, 1980, again with one judge dissenting. See Appendix C. The Ninth Circuit's mandate has been stayed until July 7, 1980, pending the filing of this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

The constitutional provision, statutes and rule involved are U. S. Const. art. I, § 8; 15 U.S.C. §§ 1 and 2; and Fed. R. Civ. P. 12(b). The relevant portions of each are set forth in Appendix D.

STATEMENT OF THE CASE

As with any antitrust case, this case is potentially very time consuming and complex. Of the myriad of possible issues, the only one thus far considered by the federal courts[1] is whether the collection and disposal of solid waste in Phoenix, Arizona is in or affects interstate commerce.

Both plaintiff Western Waste Service Systems ("Western Waste") and defendant Universal Waste Control[2] ("Universal") collect and dispose solid waste.[3] Their service typically involves sending a refuse collection vehicle and crew to customers located in the Phoenix metropolitan area,[4] picking up the customer's refuse and then hauling that refuse to a landfill also located in the Phoenix area.[5] At no time does Universal, Western Waste or any other Phoenix refuse company cross state lines to pick up or dispose of waste. The only "connections" between plaintiff's or defendants' business activity and interstate commerce are that the parties purchased some of their vehicles and other equipment from out-of-state

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[1] Plaintiff has filed a nearly identical lawsuit in Arizona Superior Court alleging violations of the Uniform State Antitrust Act, A.R.S. § 44-1401 *et seq.* That Act is substantially identical to the Sherman Act.

[2] A second defendant, Waste Management, Inc., is involved only peripherally as the corporate parent of Universal. Plaintiff does not allege that Waste Management engaged in the waste disposal business or any other business in Arizona, and, in fact, it does not do so.

[3] We use the phrase "solid waste" and "refuse" to refer to that which the parties collect and dispose. It is more commonly and less artfully referred to as "garbage" and "trash."

[4] Unless otherwise noted, the Phoenix metropolitan area includes only Maricopa County, Arizona.

[5] Nearly all of the refuse is deposited in landfills within Maricopa County. A nominal amount of recyclable waste is hauled to and dumped at independent recycling companies and paper brokers in the Phoenix area.

suppliers and that some of the parties' customers ship recyclable materials out of state.

The district court was presented with substantial evidence regarding jurisdiction. This included evidence that while the parties did purchase some equipment from out of state, the amount of such purchases was unaffected by the parties' conduct because of the inelastic demand for waste collection services. The district court also heard evidence that the parties and other solid waste collection companies operating in Phoenix were not in the recycling business; they merely hauled recyclable paper and wood to customers who were in that business. Those customers, who are independent businesses, package, sell and ship some of the recyclable materials out of state. Having considered all these facts, the district court ruled that the parties' conduct was not in and did not substantially affect interstate commerce.

The Ninth Circuit rejected the district court's view of the facts. It ruled that the district court must, under Rule 12(b)(1), accept as true the jurisdictional facts presented by the plaintiff. *Western Waste Service v. Universal Waste Control, supra, id.* at 1096. It therefore reversed the district court's judgment of dismissal.

REASONS FOR GRANTING THE WRIT

I. *The Ninth Circuit's Determination That the District Court Cannot Resolve Factual Disputes on Jurisdictional Issues Misconstrues this Court's Decision in McLain v. Real Estate Board of New Orleans, Inc.*

The Ninth Circuit seriously misconstrued this Court's ruling in *McLain v. Real Estate Board of New Orleans, Inc.*, 100 S. Ct. 502 (1980). The lower court ruled that *McLain* eliminated district courts' authority under Rule 12(b)(1) to make pre-trial factual determinations on

whether federal subject matter jurisdiction exists. *Western Waste Service v. Universal Waste Control, supra* 616 F.2d at 1095, n.1. According to the Ninth Circuit, if the plaintiff presents any evidence to support his jurisdictional allegations, no matter how persuasive the evidence to the contrary, plaintiff is entitled to proceed to a trial on the merits. *Id.* This ruling would not only permit improperly filed suits to clog the dockets, but also give a plaintiff the right to a jury trial on the issue of jurisdiction, a right the courts have consistently ruled plaintiffs do not have. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 512 (5th Cir. 1980); *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.* 469 F.2d 416, 418 (5th Cir. 1972).

The Ninth Circuit eliminated and confused the distinctions between Rules 12(b)(1) and 12(b)(6). Applying the proper procedure for a Rule 12(b)(1) motion, the district court allowed the parties to submit evidence on the issue of jurisdiction and required plaintiff to shoulder the burden of proof. Where the jurisdictional and substantive issues are separable, as they were here, this has been the approved procedure in the Ninth Circuit. *Thornhill Publishing Co., Inc. v. General Telephone & Electronics Corp.*, 594 F.2d 730 (9th Cir. 1979); *Berardinelli v. Castle & Cooke Inc.*, 587 F.2d 37 (9th Cir. 1978); *Gough v. Rossmoor Corp.*, 487 F.2d 373 (9th Cir. 1973), *cert. denied*, 99 S. Ct. 1280 (1979). However, in the case at bar, the Ninth Circuit ruled, without citing any of its previous decisions on the point, that *McLain* held that the trial court "had [no] authority to inquire into and determine the facts relating to Sherman Act jurisdiction" on a Rule 12(b)(1) motion. *Western Waste Service v. Universal Waste Control, supra*, 616 F.2d at 1095, n. 1. In fact, *McLain* stated to the contrary:

> To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and *if these*

> *allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings* either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce. (Emphasis added.)

McLain v. Real Estate Board of New Orleans, Inc., supra, 100 S. Ct. at 509. In *McLain*, the facts presented to the district court in support of plaintiffs' jurisdictional allegations were uncontroverted. The Court ruled that the district court erred, not in deciding contested factual allegations, but in applying the wrong test of jurisdiction to the particular facts.[6]

The fundamental procedural difference between the motions in question is that a district court may rely upon evidentiary matter in deciding a Rule 12(b)(1) motion while a court considering a Rule 12(b)(6) motion cannot. As was stated in *Land v. Dollar*, 330 U.S. 731, 735, n.4, 67 S. Ct. 1009, 1011, 91 L. Ed. 1209 (1947):

> In passing on a motion to dismiss because the complaint fails to state a cause of action, the facts set forth in the complaint are assumed to be true and affidavits and other evidence produced on application for a preliminary injunction may not be considered. *Polk Co. v. Glover*, 305 U.S. 5, 9, 59 S. Ct. 15, 16, 83 L. Ed. 6; *Gibbs v. Buck*, 307 U.S. 66, 76, 59 S. Ct. 725, 731, 83 L. Ed. 1111. But when a question

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[6] The lower courts had some difficulty deciding the basis for dismissal. *See McLain v. Real Estate Board of New Orleans, Inc., supra*, 100 S. Ct. at 508. But this Court viewed the motion as a motion to dismiss for failure to state a claim as shown by the fact that the authorities relied upon by the Court do not involve jurisdictional issues. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); 5 Wright and Miller, *Federal Practice and Procedure: Civil* §§ 1202, 1205-1207, 1215-1224, 1228, (1969) cited at 100 S. Ct. at 511.

> of the District Court's jurisdiction is raised, . . . the court may inquire by affidavits or otherwise, into the facts as they exist. *Wetmore v. Rymer*, 169 U.S. 115, 120, 121, 18 S. Ct. 293, 295, 42 L. Ed. 682; *McNutt v. General Motors Corp.*, 298 U.S. 178, 184 *et seq.*, 56 S. Ct. 780, 783, 80 L. Ed. 1135; *KVOS, Inc., v. Associated Press*, 299 U.S. 269, 278, 57 S. Ct. 197, 201, 81 L. Ed. 183.[7]

Of course, separation and decision of the jurisdictional issue prior to trial is both sensible and permissible because the parties have no right to trial by jury on the issue of jurisdiction. *Menchaca, supra*; *Rosemund, supra*.

Another reason for different procedures is that the consequence of losing a Rule 12(b)(6) motion is more severe than losing a Rule 12(b)(1) motion. A Rule 12(b)(6) motion results in a determination on the merits and is *res judicata*. *Mortensen v. First Federal Savings & Loan Association, supra*, 549 F.2d at 891; *Exchange National Bank of Chicago v. Touche Ross & Co., supra*, 544 F.2d at 1131. Therefore, the non-moving party is safeguarded by having all allegations taken as true and all inferences drawn in his favor. *Mortensen v. First Savings & Loan Association, supra*, 549 F.2d at 891. However, a Rule 12(b)(1) motion attacks only jurisdiction. A determination by the court that it lacks jurisdiction to proceed has no *res judicata* effect as to the merits of the claim. Therefore, the non-moving party is not entitled to the safeguards which attach to a Rule 12(b)(6) motion and must bear the burden of proving jurisdiction. *Thomson v. Gaskill*, 315 U.S. 442, 62 S. Ct. 673, 86 L. Ed. 951 (1942); *Thornhill Publishing Co. v. General Telephone & Elec-*

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[7] Several recent circuit court decisions make this same distinction. *See Mortensen v. First Federal Savings & Loan Association*, 549 F.2d 884 (3d Cir. 1977); *Exchange National Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126 (2d Cir. 1976); *Berardinelli v. Castle & Cooke Inc., supra*.

tronics Corp., 594 F.2d 730, 733 (9th Cir. 1979); *Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc.*, 568 F.2d 1074 (5th Cir.), *cert. denied*, 439 U.S. 836, 99 S. Ct. 120 (1978); 5 Wright & Miller, *Federal Practice & Procedure: Civil* § 1350, p. 551 (1969).

This substantive consequence is of great importance in a case such as this where there is a parallel state court antitrust action. Dismissal on the basis of Rule 12(b)(1) in federal court has no *res judicata* impact on the state case. A plaintiff, therefore, need not fear the federal decision being used against it and may, as has Western Waste in this case, proceed in state court.

II. *There Is Conflict Among the Circuits on How to Treat Jurisdictional Challenges.*

In the wake of *McLain*, there is a direct conflict among the circuits regarding the ability of the district court to consider conflicting evidence on subject matter jurisdiction. In this case, the Ninth Circuit reversed *sub silentio* its previous rule to hold that the district court cannot consider nor weigh conflicting factual presentations. However, the Fifth Circuit, in another post-*McLain* decision, specifically approved the district court's resolution of conflicting factual presentations on a Rule 12(b)(1) motion. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir. 1980). Relying on *McLain* and the Ninth Circuit's own *Thornhill Publishing Co.* decision, *supra*, *Menchaca* properly recognized that if the jurisdictional issue is separable from the merits, the court is free to resolve factual disputes concerning jurisdiction.[8]

The conflict between these recent cases magnifies the already existing "substantial confusion"[9] regarding the proper procedure for jurisdictional challenges, particularly in antitrust cases. The Seventh Circuit holds the

[8] *Menchaca* illustrates that the procedural confusion in the circuits is not limited to antitrust cases. Although the Fifth

view that the jurisdictional issue should not be resolved by a Rule 12(b)(1) motion if there are factual disputes. *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Association*, 484 F.2d 751, 759 (7th Cir. 1973), *cert. denied*, 414 U.S. 1131, 94 S. Ct. 870, 38 L. Ed. 2d 755 (1974); *Gateway Associates, Inc. v. Essex-Costello, Inc.*, 380 F. Supp. 1089, 1094 (N.D.Ill. 1974) ("The law in this Circuit now seems to require the district courts to try antitrust cases on the merits before they may determine whether they even have the jurisdiction or power to do so.") As noted earlier, the procedure in the Ninth Circuit, at least prior to the instant case, is to the contrary. A district court in the Ninth Circuit should receive evidence on the issue of jurisdiction and resolve the conflict prior to trial on the merits. *Thornhill Publishing Co. v. General Telephone & Electronics Corp.*, *supra*; *Berardinelli v. Castle & Cooke Inc.*, *supra*; *Gough v. Rossmoor Corp.*, *supra*.

In Mortensen v. First Federal Savings & Loan Association, *supra*, the Third Circuit struck a middle ground. While recognizing the general rule that the district court can resolve factual disputes on a Rule 12(b)(1) motion, it applied a special rule in Sherman Act cases. The Third Circuit expressed the view that the Sherman Act inextricably intertwines jurisdictional and substantive questions. Separate treatment, therefore, is not possible. This is directly contrary to the Ninth Circuit position stated in *Gough v. Rossmoor Corp.*, *supra*.

Circuit relied primarily on antitrust cases, *Menchaca* is a Civil Rights Act case. The question of how to determine subject matter jurisdiction obviously exists in all federal cases. Determination of the proper procedure to be followed in this regard is thus of great importance generally.

[9] *Mortensen v. First Savings & Loan Association*, *supra*, 549 F.2d at 894.

Prior to *Menchaca v. Chrysler Credit Corp., supra*, the Fifth Circuit had vacillated on this question. In *McBeath v. Inter-American Citizens for Decency Committee*, 374 F.2d 359 (5th Cir.), *cert. denied*, 389 U.S. 896, 88 S. Ct. 216, 19 L. Ed. 2d 214 (1967), that court reversed a dismissal, holding that the decision on the jurisdiction should coincide with trial on the merits. But *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F.2d 416, 418 (5th Cir. 1972), affirmed a pretrial dismissal under Rule 12(b)(1) and explicitly placed the burden of proof on plaintiff. *See also Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc., supra.*

Because of this clear conflict among the circuits, this Court should now finally settle the question of the proper procedure to be followed when a motion to dismiss for lack of subject matter jurisdiction is presented to the district court.

III. *District Courts Need the Ability to Eliminate Sherman Act Cases if There Is No Jurisdiction.*

The practical consequences of the Ninth Circuit's ruling are staggering. That court effectively eliminated the district court's ability to dispose of antitrust cases on jurisdictional grounds prior to trial. This decision will substantially add to the workload of the federal system which, as this Court is keenly aware, has increased tremendously in recent years.

The most recent compilation by the Director of the Administrative Office of the United States Courts shows more than 165,000 cases pending before the United States District Courts.[10] Compare this current case load

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[10] *1979 Annual Report of the Director of the Administrative Office of the United States Courts*, page 392 (Table C6A) [hereinafter *1979 Report*].

with 93,207 cases pending in district courts in 1970[11] and 119,767 cases pending in 1975.[12] The number of civil cases filed has also increased nearly twofold in the past decade. There were approximately 87,000 new cases filed in 1970, but 155,000 new actions filed in 1979.[13] The Chief Justice recently noted that there were 317 cases for each district judge in 1970, but approximately 400 cases per judge in 1980. Burger, *Annual Report on the State of the Judiciary — 1980*, 66 A.B.A.J. 295, 297 (March 1980). After reviewing the general increase in workload, the Chief Justice concluded, "The impact of 152 new federal judges in the omnibus bill last year will soon be wiped out." *Id.*

It is not only the number of new case filings which burden the federal courts but also the complexity of cases and resulting increase in time to dispose of each case. Antitrust cases are among the most complex and time-consuming cases considered by federal courts. The median time for disposition of an antitrust case which goes to trial is 33 months. Ten percent of antitrust cases which are tried take more than five and a half years to complete. The median time to dispose of antitrust cases which do not go to trial is also substantially above the time for most other types of actions.[14] These figures do not include the time for appeal.

The extraordinary burden placed upon federal courts by antitrust cases is highlighted when these cases are compared with other types of actions. The median time

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[11] *1979 Report*, page 213 (Table 15).

[12] *Id.*

[13] *1979 Report*, page 126 (Table 4).

[14] All data in this paragraph taken from *1979 Report*, pages 389-391 (Table C5A).

for all federal question litigation which goes to trial is 20 months; the median time for trials under the Labor Management Relations Act is 17 months; the median time for tax suits is 8 months.[15] Indeed, the median time for all types of federal actions except bankruptcies and patent suits is less than antitrust cases.[16] According to the most recent time study available, private antitrust cases consume nearly twice as much court time as the average federal case.[17]

Because of the extraordinary amount of federal court time consumed by antitrust cases, it is especially important to resolve jurisdictional questions at the earliest possible stage of litigation. An unfortunate waste of energy, time and resources for the court, the parties and counsel results when an antitrust case works it way through the court system only to be dismissed for lack of subject matter jurisdiction following presentation of plaintiffs' case at trial or later.[18] How much more efficient to allow determination of jurisdictional issues at an early stage so that antitrust cases which should not be in the federal system are discovered before substantial court hours are wasted. This waste of court time should be avoided by allowing the district court to consider evidence and determine jurisdictional issues at an appropriate pretrial stage.

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[15] *1979 Report*, pages 389-391 (Table C5A).

[16] *Id.*

[17] Federal Judicial Center, *The 1969-1970 Federal District Court Time Study* (June 1971) page 66 E (Table XVII).

[18] Lack of subject matter jurisdiction may be asserted at any time by any interested party or by the court *sua sponte*. 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1350, pp. 544-545 (1969).

IV. *The Ninth Circuit Misapplied the Substantive Test for Jurisdiction Under the Sherman Act.*

Consistent with decisions of this Court and a virtually identical Ninth Circuit opinion, *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969), the district court required Western Waste to show that the matters complained of were either in or affected interstate commerce. On appeal, the Ninth Circuit, relying upon *McLain v. Real Estate Board of New Orleans, Inc.*, *supra*, rejected this test: "The Court [in *McLain*] held that it was not necessary for the alleged antitrust violations complained of to have affected interstate commerce so long as defendants' *business activities, independent of the violations*, affected interstate commerce." *Western Waste Service v. Universal Waste Control*, *supra*, 616 F.2d at 1097. (Emphasis added.) The Ninth Circuit ruling goes well beyond *McLain* and any other decision of this Court.

The *McLain* holding was certainly not the radical departure from previous doctrine suggested by the Ninth Circuit. Rather, *McLain* held that a plaintiff did not necessarily have to prove that the precise activity alleged to be illegal affected interstate commerce if the defendant's business affected an interstate activity that was inseparably part of the challenged transaction. *McLain v. Real Estate Board of New Orleans, Inc.*, *supra*, 100 S. Ct. at 509. As this Court properly noted, that is consistent with its previous decisions. *Id.*

Prior to *McLain*, the Court had repeatedly held that the conduct complained of must either be in interstate commerce or, if intrastate, have a substantial affect on interstate commerce to establish Sherman Act jurisdiction. In *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976), the most recent pronouncement on this issue prior to *McLain*, the Court said that: " '[W]holly local business

restraints can produce the effects condemned by the Sherman Act.' . . . [Citation omitted]. *As long as the restraint in question 'substantially and adversely affects interstate commerce,'* [citations omitted] the interstate commerce nexus required required for Sherman Act coverage is established." (Emphasis added.) *See also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784-85, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194, 202-03, 95 S. Ct. 392, 397-02, 42 L. Ed. 2d 378 (1974); *Burke v. Ford*, 389 U.S. 320, 321, 88 S. Ct. 443, 444, 19 L. Ed. 2d 554 (1967); *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-33, 67 S. Ct. 1560, 1566-68, 91 L. Ed. 2010 (1947).

There must be some substantial nexus between the aspect of defendant's business under challenge and interstate commerce. In *McLain*, the setting of brokerage fees was wholly intrastate. However, the purchase of a home, the plaintiff's primary interest, subsumed the brokerage activity of the defendants and was in interstate commerce. *McLain*, *supra*, 100 S. Ct. at 510, citing *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975). Therefore, because the intrastate activity of setting brokerage fees affected the larger interstate activity of purchasing a home, setting brokerage fees affected interstate commerce. The Court wrote: "[W]hatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce." *McLain*, *supra*, 100 S. Ct. at 511.

The Ninth Circuit made a quantum leap from *McLain* to its holding in the instant case. Waste collection is not part of or tangential to a larger interstate activity in which the plaintiff or defendant has an interest. Plaintiff

has come forth with no facts showing how the business of solid waste collection increases or decreases the flow of interstate commerce. Plaintiff has merely shown *contact* with interstate commerce through the purchase of supplies or subsequent interstate movement of goods. But the same is true of all businesses. It is not hyperbole to say that all businesses receive some out-of-state supplies and deal with matters that eventually flow across state boundaries. If mere contact by purchase of supplies is all that is needed, the Commerce Clause would be meaningless as a control on federal power, federal antitrust jurisdiction would be limitless and there would be no need for state antitrust laws.

McLain does not overrule the tests set forth in *Hospital Building Co.*, *Gulf Oil*, and *Yellow Cab*. Indeed, *McLain* cited and relied upon those decisions. 100 S. Ct. at 509. The Court merely made clear that the plaintiff did not have to prove that interstate commerce was affected as a consequence of the violation.

The Ninth Circuit has eliminated the district court's right to resolve factual disputes on the jurisdictional question prior to a full-blown trial whenever a plaintiff can come forward with any evidence, no matter how meager, to support his jurisdictional allegation. The court erroneously held that the Commerce Clause is satisfied whenever any aspect of defendant's business contacts interstate commerce. The practical consequences of this decision is to keep all Sherman Act cases in federal court, regardless of how attenuated the facts supporting jurisdiction. This is wrong. The proper result is either to affirm the district court or remand to the district court for a further hearing on jurisdiction.

CONCLUSION

We respectfully submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Paul G. Ulrich

LEWIS AND ROCA
100 West Washington Street
Phoenix, Arizona 85003
602/262-5311

Joseph V. Giffin

CHADWELL, KAYSER, RUGGLES,
McGEE & HASTINGS, LTD.
8500 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
312/876-2100
Counsel of Record for Petitioners

Additional Counsel:

Andrew S. Gordon
Foster Robberson

LEWIS AND ROCA
100 West Washington Street
Phoenix, Arizona 85003
602/262-5311

July, 1980

Paul G. Ulrich, Esq.
Andrew S. Gordon, Esq.
LEWIS AND ROCA
First National Bank Plaza
100 West Washington
Phoenix, Arizona 85003
(602) 262-5381

Joseph V. Giffin, Esq.
CHADWELL, KAYSER, RUGGLES,
McGEE & HASTINGS
Suite 8500 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(302) 876-2165
Attorneys for Defendants Universal
Waste Control and Waste Management, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WESTERN WASTE SERVICE SYSTEMS, an Arizona corporation,	)	
Plaintiff,	)	NO. CIV 77-178 PHX WEC
vs.	)	
	)	JUDGMENT
UNIVERSAL WASTE CONTROL, a California corporation; WASTE MANAGEMENT, INC., a Delaware corporation,	)	
Defendants.	)	

Defendant, Universal Waste Control, having filed a motion to dismiss the complaint for lack of subject matter jurisdiction, defendant Waste Management, Inc., having joined in that motion, the plaintiff, Western Waste Control, having responded and opposed the motion, the Court having considered the pleadings on file, the motions, the responses, and all discovery taken in this matter relating to the motion, and this matter having been argued to the Court:

IT IS HEREBY ORDERED AND ADJUDGED that the Motion to Dismiss is granted, that the plaintiff takes nothing thereby, and that the Amended Complaint and action be and they are hereby dismissed.

S/ Walter E. Craig

United States District Judge

Appendix B-1

WESTERN WASTE SERVICE SYSTEMS,
Plaintiff-Appellant,
v.
UNIVERSAL WASTE CONTROL and Waste Management, Inc., Defendants-Appellees.

No. 77-3131.
United States Court of Appeals, Ninth Circuit.
March 4, 1980.
Rehearing Denied April 28, 1980.

Before KENNEDY and ANDERSON, Circuit Judges, and CLAIBORNE,* District Judge.

KENNEDY, Circuit Judge:

The narrow issue in this case is whether a garbage collection business in Phoenix, Arizona sufficiently affects interstate commerce to fall within the protection of section 1 of the Sherman Act. Finding this court's previous decision in *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969), to be controlling, the district court granted a pretrial motion to dismiss the action, holding "there is no sufficient nexus with interstate commerce to support Sherman Act jurisdiction." The plaintiff brought this appeal. We conclude that *Sun Valley* is distinguishable from the case before us, and that the standards announced in intervening Supreme Court opinions establish that there is jurisdiction here. We vacate the judgment of the trial court and remand the cause for further proceedings.

Appellant Western Waste Service Systems (Western Waste), the plaintiff below, is an Arizona corporation engaged in the waste disposal business in the Phoenix metropolitan and adjoining areas. Universal Waste Control

* Honorable Harry E. Claiborne, United States District Judge for the District of Nevada, sitting by designation.

(Universal) is a California corporation engaged in the waste disposal business in the same area. Universal is a wholly-owned subsidiary of defendant Waste Management, Inc., a Delaware corporation

Western Waste brought suit against Universal and Waste Management, claiming that Universal had monopolized and attempted to monopolize the waste disposal business in Phoenix by providing waste disposal services at prices substantially below cost. Western Waste also charged that Universal conspired with other competitors to eliminate Western Waste from the waste disposal business. Universal moved to dismiss for lack of subject matter jurisdiction. After discovery was taken on this issue, the district court granted Universal's motion, holding that the garbage collection business was a local one which did not affect interstate commerce.

In this appeal and for purposes of Universal's motion, we must read the pleadings and evidence adduced in discovery in the light most favorable to Western Waste.[1]

[1] Universal's argument that the district court had authority to inquire into and determine the facts relating to Sherman Act jurisdiction at this stage of the proceedings was expressly rejected by the Supreme Court this term in *McLain v. Real Estate Bd.*, ____U.S. ____, 100 S. Ct. 502, 62 L.Ed.2d 441 (1980). In *McLain*, the defendant also moved to dismiss for lack of jurisdiction. After discovery was taken on this issue, the district court granted the motion and the Fifth Circuit affirmed. In vacating the judgment, the Supreme Court ruled that the pleadings, as supplemented by the evidence produced in discovery, had to be read in the light most favorable to the party against whom the motion was made. The inquiry was said to be whether there was a sufficient basis for plaintiff to proceed to trial to establish Sherman Act jurisdiction. In concluding that the jurisdictional requirements had been met, the Court declared:

> It is axiomatic that a complaint should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 [78 S.Ct. 99, 101–102,

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The following facts must be taken as true in ruling on Universal's motion. Both Western Waste and Universal acquire a substantial amount of their garbage collection equipment from out of state. All trucks and truck bodies were manufactured outside of Arizona and most of the rubbish containers purchased were also manufactured outside of Arizona. Some of the waste material which is collected by Universal is paper which is hauled to paper brokers in Phoenix for shipment out of state. Scrap wood is also collected by Universal and shipped to recyclers. Approximately four tons of such wood were sent by Universal to recyclers from June 1, 1976 to May 31, 1977. The recyclers make this material into wood chips which are shipped out of state.

Both Western Waste and Universal are distributors of garbage compactors manufactured by out-of-state companies for sale or lease within Phoenix. In 1975, Western Waste became the Phoenix dealer of Blackwelder, a California manufacturer of compaction equipment. Blackwelder's compactor was new to the market and had unique features. Western Waste sent two of its employees to California for instruction in the selling and servicing of Blackwelder compaction equipment. In 1976 Universal used its market power and the power of its parent com-

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2 L.Ed.2d 80] (1957); see 5 Wright & Miller, Federal Practice and Procedure: Civil §§ 1202, 1205–1207, 1215–1224, 1228. This rule applies with no less force to a Sherman Act claim, where one of the requisites of a cause of action is the existence of a demonstrable nexus between the defendants' activity and interstate commerce. Here what was submitted to the District Court shows a sufficient basis for satisfying the Act's jurisdictional requirements under the effect on commerce theory so as to entitle the petitioners to go forward. We therefore conclude that it was error to dismiss the complaint at this stage of the proceedings.

____U.S. at ____, 100 S.Ct. at 511.

pany to induce Blackwelder to terminate Western Waste's distributorship and choose Universal as its exclusive distributor. Subsequently, Universal advertised itself as Blackwelder's exclusive distributor in Phoenix.

The standards which we must apply to these facts are familiar. It is established that the reach of the Sherman Act is as inclusive as the constitutional limits of Congress' power to regulate interstate commerce. *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944); *Thornhill Publishing Co. v. General Tel. & Elec. Corp.,* 594 F.2d 730 (9th Cir. 1979); *Rasmussen v. American Dairy Ass'n,* 472 F.2d 517 (9th Cir.), *cert. denied,* 412 U.S. 950, 93 S.Ct. 3014, 37 L.Ed.2d 1003 (1973). As judicial construction of the scope of the commerce clause has expanded, so has the reach of the Sherman Act. *Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186, 202, 95 S.Ct. 392, 402, 42 L.Ed.2d 378 (1974); *Rasmussen, supra,* 472 F.2d at 521. "[T]he conduct of the defendants is within the jurisdictional reach of the Sherman Act if Congress can prohibit that conduct under the commerce clause." *Id.*

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies "in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (1976). This phrase defines both the conduct proscribed by the statute and its jurisdictional reach. *Gough v. Rossmoor Corp.,* 487 F.2d 373 (9th Cir. 1973). In resolving the jurisdictional issue, our task is to assume, without deciding, that the conduct complained of constitutes a violation of the Sherman Act and then to determine whether that conduct could be regulated under the commerce power. *Rasmussen, supra,* 472 F.2d at 522.

To establish Sherman Act jurisdiction, the district court required Western Waste to show that Universal's alleged antitrust violations had a substantial effect on

interstate commerce. This test, however, was rejected by the Supreme Court this Term in *McLain v. Real Estate Bd.*, ____U.S. ____, 100 S.Ct. 502, 62 L.Ed.2d 411 (1980). In *McLain* real estate purchasers brought suit against real estate brokers in the New Orleans area, claiming that the brokers had fixed their commissions in violation of the Sherman Act. The district court granted defendants' motion to dismiss for lack of subject matter jurisdiction, 432 F.Supp. 982 (E.D.La.1977), and the Fifth Circuit affirmed. 583 F.2d 1315 (5th Cir. 1978). In vacating the judgment, the Supreme Court unanimously held that the defendants' brokerage activities substantially affected interstate commerce so as to confer Sherman Act jurisdiction. The Court held that it was not necessary for the alleged antitrust violations complained of to have affected interstate commerce as long as defendants' business activities, independent of the violations, affected interstate commerce. The Court declared:

> To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful. The validity of this approach is confirmed by an examination of the case law. If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases. See *American Tobacco Co. v. United States*, 328 U.S. 781, 811 [66 S.Ct. 1125, 1139, 90 L.Ed. 1575] (1946); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 225, n.59 [60 S.Ct. 811, 846, 84 L.Ed. 1129] (1940). A

> violation may still be found in such circumstances because in a civil action under the Sherman Act, liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 [98 S.Ct. 2864, 2864, 57 L.Ed.2d 854] (1978); see *United States v. Container Corp.*, 393 U.S. 333, 337 [89 S.Ct. 510, 512, 21 L.Ed.2d 526] (1969); *United States v. National Assn. of Real Estate Boards*, 339 U.S. 485, 489 [70 S.Ct. 711, 714, 94 L.Ed. 1007] (1950); *United States v. Socony Oil Co., supra*, 310 U.S. 150 at 224–225 n.59 [60 S.Ct. [811], at 844–846, 84 L.Ed. 1129].

____U.S. at ____, 100 S.Ct. at 509.

The standard announced by the Supreme Court must, of course, govern our decision in this case. Applying this test to the facts that we must accept as true for the purpose of Universal's motion, we conclude that the pleadings and evidence adduced by Western Waste at this stage of the proceedings provide more than a sufficient basis for Western Waste to proceed to trial to establish Sherman Act jurisdiction. We believe that the facts establish not only that Universal's rubbish collection business substantially affected interstate commerce, but also that the alleged antitrust violations substantially affected interstate commerce.[2] Under *McLain* it is unnecessary to establish that the alleged antitrust violations substantially affected interstate commerce, but when, as

[2] The dissent argues that *McLain* stands for the proposition that a party suing under the Sherman Act must demonstrate a substantial nexus between the *plaintiff's* business activities and interstate commerce. We disagree. The Supreme Court made clear there that the focus of the inquiry is on the *defendant's* business. The fact that the opinion in *Sun Valley* directed its analysis to determining whether the plaintiff's business affected interstate commerce provides a further basis for concluding that its test for Sherman Act jurisdiction has been rejected by the Supreme Court.

here, this effect is alleged, it is a strong indicator that the defendant's business has an interstate impact.

Universal's acts directly impeded a line of interstate commerce. Before Universal's acts, Western Waste was engaged in the purchase of garbage compaction equipment from an out-of-state supplier. Universal used its market power to attempt to terminate this relationship. Shortly thereafter, Western's dealership was cancelled and Universal advertised that it was the supplier's exclusive distributor in Phoenix.

Universal spent $69,680 in 1975 and $356,061 in 1976 for equipment purchased out of state. Western Waste spent $88,335 and $124,007 during these respective years for out-of-state equipment. This evidence demonstrates that Universal's business substantially affected interstate commerce. It demonstrates, moreover, that the alleged antitrust violations had a substantial effect on interstate commerce. If Universal succeeds in its alleged attempt to drive Western Waste out of business, Western Waste's purchases will be totally eliminated. *See Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 744, 96 S.Ct. 1848, 1852, 48 L.Ed.2d 338 (1976). A reasonable inference from the record is that the alleged antitrust violations reduced Western Waste's purchases during the periods in question.

Universal hauls several tons of waste which it collects to paper brokers and recyclers that ship these materials out of state. This evidence also demonstrates Universal's effect on interstate commerce as these shipments were the beginning point for a significant line of interstate commerce. If Universal succeeds in its alleged attempt to drive Western Waste out of business, the number of suppliers from whom the dealers may purchase such scrap materials for out-of-state shipment will diminish.

With fewer suppliers in the market, the suppliers of such scrap materials will be able to restrict supply and raise their prices with a concomitant reduction in the interstate commerce of such materials. *See id.*

Universal contends, however, that this case is controlled by our decision in *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969). In that case this court wrote:

> Appellant conducted a wholly local garbage disposal and container leasing business. Appellant supplied this business with equipment from out of state. This fact alone does not turn what was really a local activity into an interstate one.

Id. at 343. In *Sun Valley,* the court required the plaintiff to show that the alleged antitrust violation affected interstate commerce. As we have noted above, this reasoning was rejected by the Supreme Court in *McLain*. Furthermore, in the intervening Supreme Court case of *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976), the Court held that acts which affect the out-of-state purchases, financing, and revenues of intrastate businesses provide a sufficient basis for Sherman Act jurisdiction. In any event the facts here are sufficiently different from those in *Sun Valley* so as to confer jurisdiction on the district court under the Sherman Act. First, a direct restraint on a line of interstate commerce is present here while none was present in *Sun Valley*. Second, Universal hauls several tons of the waste which it collects to scrap dealers and paper brokers which ship these materials out of state. Universal's argument that its role is somehow incidental to the shipping of these materials out of state and that this defeats jurisdiction was expressly rejected by the Supreme Court in *Rex Hospital* and *McLain*. In *McLain* the Supreme Court declared that jurisdiction under the

Sherman Act is not defeated by a plaintiff's failure "to quantify the adverse impact of defendant's conduct." *McLain, supra,* ____U.S. at ____, 100 S.Ct. at 510.

Third, a substantial amount of garbage collection equipment, including trucks, truck bodies and containers is purchased from out of state each year. We noted in *Rasmussen v. American Dairy Ass'n,* 472 F.2d 517 (9th Cir.), *cert. denied,* 412 U.S. 950, 93 S.Ct. 3014, 37 L.Ed.2d 1003 (1973), that "[t]he opinion [in *Sun Valley*] discloses none of the underlying business facts upon which [its] conclusion rests, and it may well be that the supplies moving in interstate commerce were an economically insignificant part of the total service rendered." *Id.* at 527. In *Rasmussen* we held that when all the ingredients of a product have been obtained from interstate commerce, then actions undertaken to restrain trade in that product sufficiently affect interstate commerce to confer jurisdiction under the Sherman Act. We noted that "[i]n this area perhaps more than in most, each case must turn on its own facts." *Id.* at 526.[3]

Finally, Universal finances almost all of its equipment purchases by borrowing from Waste Management in Il-

[3] The dissent suggests that our opinion in *Rasmussen* failed to define the term "substantial effect on interstate commerce" and suggests that en banc proceedings are necessary to do this. Our opinion in *Rasmussen,* however, comprehensively and correctly discusses this standard, *see* 472 F.2d at 521–24, 526–28, and the intervening Supreme Court decisions discussed in the text reinforce our view that the standard articulated there is correct.

Even if, as the dissent suggests, the opinions in *Sun Valley* and *Rasmussen* can be viewed as establishing conflicting tests to determine whether out-of-state purchases provide a sufficient basis for Sherman Act jurisdiction, the Supreme Court clearly embraced the *Rasmussen* approach in the intervening case of *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 744, 96 S.Ct. 1848, 1852, 48 L.Ed.2d 338 (1976).

linois. Universal made interest payments to Waste Management which amounted to $178,624 in 1975 and $123,505 in 1976. In addition, Universal paid management and corporate service and development fees to Waste Management in Illinois totalling $130,100 in 1975 and $145,100 in 1976. Revenues collected by Universal are transferred to an account in California from which approximately $300,000 per month is transferred to Waste Management in Illinois. No such out-of-state financing or remission of revenues to out-of-state sources was present in *Sun Valley*. The interstate flow of these funds could reasonably be expected to fluctuate in direct proportion to Universal's success in conducting its alleged antitrust violations.

The intervening Supreme Court cases and the material differences in the facts of this case from the facts in *Sun Valley* establish that the district court had jurisdiction over Western Waste's claim. It is possible that the evidence relied upon by Western Waste to establish jurisdiction at this stage will be rejected at trial by the finder of fact. Nothing we say here should be taken to indicate that we have indeed found the facts to be in Western Waste's favor. We also express no opinion on whether the matters alleged constitute antitrust violations. That is a determination to be made in another proceeding. We do hold that "what was submitted to the District Court shows a sufficient basis for satisfying the [Sherman] Act's jurisdictional requirements under the effect on commerce theory so as to entitle the [plaintiff] to go forward." *McLain, supra,* ____U.S. at ____, 100 S.Ct. at 511.

The judgment of the district court is VACATED and the cause REMANDED for further proceedings consistent with this opinion.

CLAIRBORNE, District Judge, Sitting by Designation (dissenting):

This case demonstrates perfectly the "Hobson's choice" which a United States District Judge sometimes faces in attempting to render a decision. The Court below, in dismissing the complaint on the grounds of want of subject matter jurisdiction on a motion for summary judgment, held that the case of *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969) was so indistinguishable as to be controlling. The Court was correct. The problem Judge Craig faced was that the *Sun Valley* opinion, arguably, is incorrect as a matter of law. As a District Court Judge in the Ninth Circuit, I recognize the dilemma which the lower Court faced; my brother Craig acted as I would have, which is to follow controlling Ninth Circuit authority which, however questionable, has not been explicitly overruled.

The fact that the two cases are indistinguishable is readily apparent. *Sun Valley* involved a Sherman Act complaint as between two garbage disposal and container leasing services in Clark County, Nevada, and an affirmance of a granting of a motion for summary judgment in favor of the defendants on the grounds of want of subject matter jurisdiction. The Ninth Circuit held: 1) The acts complained of did not occur within the flow of interstate commerce, since the business of container leasing is wholly local in character; the acts complained of did not affect any "interstate commerce part" of plaintiff's business; 2) Plaintiff conducted a wholly local garbage disposal and container leasing business, and the mere fact that it supplied this business with equipment from out of state did not substantially affect interstate commerce, since it alone does not turn what was really a local activity into an interstate activity. 420 F.2d at 343.

Like *Sun Valley,* the instant case involves the business of refuse hauling and container leasing within Maricopa County, Arizona, a business which is indisputably in-

trastate in nature; neither Appellant nor Appellee Universal services any accounts outside of that county. And, like *Sun Valley,* the Appellant at bar ultimately has shown nothing more than the mere fact that it has purchased equipment and supplies which have moved in interstate commerce.

However, the majority takes the positions first, that the *Sun Valley* case has been somehow overruled by implication in subsequent Ninth Circuit and Supreme Court opinions; and second, that the *Sun Valley* case is factually distinguishable from the case at bar. I disagree with both views. It is more accurate to conclude first, that the veracity of *Sun Valley* has always been seriously questionable; second, that the Ninth Circuit, in distinguishing *Sun Valley,* has caused considerable confusion as to the meaning of "substantial effect on interstate commerce"; and third, the appropriate manner in which to dispose of this appeal is to affirm but to recommend rehearing *en banc* so that the full panel can address itself to the first two concerns.

As to the "factually distinguishable" view, the majority distinguishes *Sun Valley* on two bases: first, a direct restraint on a line of commerce was demonstrated herein but not in *Sun Valley;* and second, that Universal hauls wood and paper waste byproducts as a beginning point for an ancillary "but significant" line of commerce.

As to the first point, I see no distinction conceptually between the garbage collection business in Clark County, Nevada and the garbage collection business in Maricopa County, Arizona. Moreover, in terms of specific facts and figures, the impact on interstate commerce in terms of real dollars as between the two cases is similar. Plaintiff proved in *Sun Valley* that it spent roughly $40,000/year on an average for equipment from out-of-state sources for

fiscal years 1961–1965;[1] Plaintiff/Appellant herein proved that it spent roughly $100,000/year for fiscal years 1976–1977 on "interstate" equipment.

As to the second point, the facts herein demonstrate that the recycling businesses in question, and not the Appellant, cause the wood and paper waste by-products to move in interstate commerce and, further, that this aspect of Appellant's business is quite secondary and incidental to its primary purpose of garbage hauling and container leasing. Like the Court below, I would rely upon *John Kalin Funeral Home, Inc. v. Fultz*, 313 F.Supp. 435, 438 (W.D. Wash.1970), *aff'd.*, 442 F.2d 1342 (9th Cir. 1971), *cert. denied*, 404 U.S. 881, 92 S.Ct. 210, 30 L.Ed.2d 162 (1971) and *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947)[2] in refuting the majority's distinction.

As to the "overruled by implication" view, the majority states that *Sun Valley* was decided on the basis of a test

[1] These figures appear on p. 11 of Appellant's Opening Brief in *Sun Valley*, are are admitted as being correct on p. 26 of Appellee's Brief therein. The fact that these figures were in no way referred to in the *Sun Valley* opinion should be a source of concern to the Judges of this Circuit, for reasons hereinafter mentioned.

[2] *Yellow Cab* involved a Sherman Act action alleging a conspiracy to control principal taxicab companies in Chicago. Plaintiffs therein attempted to demonstrate a nexus with interstate commerce by showing that the local taxicabs transported people to and from their homes who had just traveled/were about to travel in interstate commerce. The Supreme Court held that these facts failed to establish the requisite jurisdictional facts under the Sherman Act. 332 U.S. at 234, 67 S.Ct. at 1568. *Yellow Cab* clearly controls the situation at bar with respect to establishing jurisdiction on Appellant's hauling of by-products to local recycling centers. The majority's reliance in this regard upon *McLain v. Real Estate Board of New Orleans, infra*, is clearly misplaced since the *McLain* opinion does not even refer to *Yellow Cab* in passing.

which was expressly disapproved in the recent case of *McLain v. Real Estate Board of New Orleans, Inc.*, ____ U.S. ____, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980). This is not entirely correct; in fact, the two cases are not at all inconsistent. The *McLain* Court did away with the notion that a plaintiff must prove a substantial nexus between a *defendant's unlawful conduct* and interstate commerce in order to establish subject matter jurisdiction under 15 U.S.C. § 1; instead, to establish the jurisdictional element of a Sherman Act violation, a plaintiff need only demonstrate a *substantial nexus* between *plaintiff's business activities* and interstate commerce. Cf. 100 S.Ct. at 509 (emphasis supplied). But clearly, a substantial part of the *Sun Valley* holding, *supra,* is that the appellant therein's *business activities* were of a substantially local nature, and that the fact that appellant therein purchased some equipment in interstate commerce did not establish a *substantial nexus* between those essentially local activities and interstate commerce. Thus, if *Sun Valley* is no longer good law, *McLain* is not the reason why.

Similarly, and contrary to the suggestion of the majority, there is nothing in *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 that controls the disposition herein. That case came before the Supreme Court on the pleadings alone, unlike the case at bar,[3] and the Supreme Court held in *Rex Hospital* that an "indirect effect on interstate commerce" does not make the action *per se* inactionable under the Sherman Act; rather, the fact that complainant's allegations fairly claimed that the conspiracy, if

[3] The *Rex Hospital* Court noted in footnote 5 that even if the complaint therein adequately alleged an effect on interstate commerce, further proceedings could demonstrate no substantial effect thereon, thereby warranting dismissal of the action. See 426 U.S. at 748, n. 5, 96 S.Ct. at 1853, n. 5.

successful, would place "unreasonable burdens on the free and uninterrupted flow" of interstate commerce, made it sufficient to withstand a motion to dismiss. 426 U.S. at 747, 96 S.Ct. at 1853.[4] The majority attempts to apply the *Rex Hospital* case to the situation at bar by stating that the record herein supports a reasonable inference that Universal, in allegedly attempting to drive Western Waste out of business, reduced Western Waste's purchases during the year in question. The record suggests otherwise. Appellant's own facts and figures demonstrate that its purchases of equipment in interstate commerce during the years in question have increased, and Appellant's agents and employees have admitted several times in deposition that Appellant has experienced no problem thus far in obtaining equipment.

The cases which actually deserve the most comment to the situation at bar, apart from *Sun Valley*, are *United States v. Employing Plasterer's*, 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618 (1954) and *Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir. 1973). In the *Employing Plasterer's* case, the United States Supreme Court, in an opinion which predated *Sun Valley* by fifteen years, quoted from the complaint therein which it held to state a cause of action:

[4] Appellees herein suggest that there may be some inconsistencies between *Rex Hospital* and *McLain*. I am likewise concerned. *Rex Hospital* seems to set the standard of Sherman Act jurisdiction as any nexus between a plaintiff's activities and interstate commerce plus a defendant's restraint of trade which substantially and adversely affects interstate commerce (cf. 96 S.Ct. at 1852–1853), where as *McLain* sets the standard of a substantial and/or "demonstrable" nexus between a plaintiff's activities and interstate commerce. (*Supra* 99 S.Ct. at 509, 511.) Perhaps the Supreme Court has implicitly suggested alternate formulations of the same jurisdictional test, but language in the *McLain* opinion would seem to indicate otherwise. (See Majority Opinion above.)

> [Defendants] do approximately 60% of the plastering contracting business in the Chicago area of Illinois . . . Substantial quantities of this material are produced in other states, bought by Illinois building materials dealers and shipped into Illinois . . . The practical effect of all this is a continuous and almost uninterrupted flow of plastering materials from out-of-state origins to Illinois job sites for use there by plastering contractors. Restraint or *disruption of plastering work in the Chicago area thus necessarily affects this interstate flow of plastering materials adversely.*

347 U.S. at 189, 74 S.Ct. at 453. Needless to say, there seems to be a large inconsistency between *Sun Valley* and *Employing Plasterer's,* which is made all the more significant by the fact that the *Sun Valley* opinion did not even address the *Employing Plasterer's* case in passing.[5] Even more troublesome, however, is the subsequent Ninth Circuit opinion in *Rasmussen.* The Ninth Circuit held in *Rasmussen* that the complaint in that suit, alleging that the ingredients of plaintiff's "filled milk" product other than water were brought into the state from other states, alleged a sufficient relationship between defendant's alleged conduct and interstate commerce to justify holding that the conduct "substantially affected" interstate commerce. 472 F.2d at 526–527.[6] The *Rasmussen* Court distinguished *Sun Valley* by noting that each Sherman Act case must turn on its own facts, and stated that the *Sun Valley* opinion discloses none of the underlying business facts existent in *Rasmussen* (e.g., the fact that more than 50% of the "filled milk"

[5] The *Sun Valley* Court relied principally upon *Page v. Work,* 290 F.2d 323 (9th Cir.), *cert. denied,* 368 U.S. 875, 82 S.Ct. 121, 7 L.Ed.2d 76 (1961); both cases have since been disapproved in other courts. See *Mascaro & Sons, Inc. v. O'Hara, Inc.,* 565 F.2d 264, 266 (3rd Cir. 1977.)

[6] The specific holding of *Rasmussen, supra* must now be considered questionable in light of *McLain.*

product was comprised of ingredients shipped in interstate commerce) and, therefore, the "incidental" effect on interstate commerce which existed in *Sun Valley* was not present in *Rasmussen*. *Id.*

While it is true that the *Sun Valley* opinion discloses none of the underlying business facts, the truth is that appellant in *Sun Valley* discovered and disclosed those facts to the *Sun Valley* court, who proceeded to ignore them. Thus, the distinction is quite artificial, at least from the practicing lawyer's point of view. More troublesome, however, is the *Rasmussen* court's inability to define what is meant in this Circuit by a "substantial effect on interstate commerce." I recognize the principles that each Sherman Act case must turn on its own facts, and that jurisdiction is not defeated by plaintiff's failure to quantify the adverse impact of a defendant's conduct. Nonetheless, neither of these is very specific or helpful; if there is a way to harmonize *Sun Valley, Rasmussen* and the case at bar, it is in a definition of "substantial effect" on "interstate commerce" which has not been heretofore stated. Otherwise, I am at a loss to explain why the appellant in *Sun Valley* failed to meet its burden of proof as to the "substantial effect" element of Sherman Act jurisdiction, but the appellant herein did not so fail.

In sum, I see only two courses of action which are feasible. One is to overrule *Sun Valley,* which this panel has no power to do. Cf. *Ellis v. Carter,* 291 F.2d 270, 273 (9th Cir. 1961). The other is to redefine "substantial nexus between plaintiff's activities and interstate commerce," so as to harmonize and shed some much needed light on *Sun Valley, Rasmussen* and the case at bar. In either case, because of the controlling nature of *Sun Valley,* the only proper thing to do procedurally is to affirm and to address these problems in a rehearing *en banc*.[7]

For these reasons, then, I would affirm.

[7] Since I am not an active Judge of the Ninth Circuit, I have no power to suggest a rehearing *en banc*.

Appendix C-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN WASTE SERVICE SYSTEMS,	)	
Plaintiff-Appellant,	)	
v.	)	No. 77-3131
UNIVERSAL WASTE CONTROL and WASTE MANAGEMENT, INC.,	)	ORDER
Defendants-Appellees.	)	

Before: KENNEDY and ANDERSON, Circuit Judges, and CLAIBORNE,* District Judge.

The majority of the panel as constituted in the above case has voted to deny the petition for rehearing; Judge Claiborne would grant rehearing. Judges Kennedy and Anderson have voted to reject the suggestion for a rehearing en banc; Judge Claiborne recommended approval of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

*Honorable Harry E. Claiborne, United States Disrict Judge for the District of Nevada, sitting by designation.

Appendix C-2

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix D-1

1. U. S. Const. art. I, section 8: The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

2. 15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

3. 15 U.S.C. § 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

4. Federal Rule of Civil Procedure 12(b):

Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, . . . (6) failure to state a claim upon which relief can be granted . . . .

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

PAUL G. ULRICH, being first duly sworn, upon his oath deposes and says that he is a member of the Bar of this Court and one of the counsel of record for petitioners in this cause, that on this 3rd day of July, 1980, he mailed three copies of the Petition for Writ of Certiorari in this cause by depositing the Petition in the United States mail, first class postage paid, to:

P. Richard Meyer, Esq.
Henry G. Hester, Esq.
Meyer & Vucichevich
3246 North 16th Street
Phoenix, Arizona 85016,

and that he also then mailed 40 copies of the Petition to the Clerk of this Court in compliance with Supreme Court Rule 28.

_____

PAUL G. ULRICH

SUBSCRIBED AND SWORN TO before me this 3rd day of July, 1980.

_____

Notary Public

My Commission Expires:

_____